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In the Supreme Court of the United States

OCTOBER TERM, 1988

HERSCHEL L. FAGAN
LANCE CORPORAL
UNITED STATES MARINE CORPS, PETITIONER

v.

UNITED STATES OF AMERICA, RESPONDENT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

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QUESTION PRESENTED

Whether the Fourth Amendment is violated when a service member is ordered into police custody for fingerprinting, absent probable cause, judicial authorization or the servicemember's consent?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	1
TABLE OF AUTHORITIES	III
OPINIONS BELOW	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATUTES INVOLVED	2
STATEMENT OF THE CASE	5
REASONS FOR GRANTING THE WRIT	9
THE WRIT SHOULD BE GRANTED TO ENSURE THAT MILITARY COURTS PROPERLY APPLY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND DECISIONS OF THIS COURT.	
CONCLUSION	11
APPENDIX A (Opinion of the U.S. Court of Military Appeals)	1a
APPENDIX B (Opinion of the U.S. Navy-Marine Corps Court of Military Review)	14a

TABLE OF AUTHORITIES

Cases:

Davis v. Mississippi, 394 U.S. 721 (1969)	9, 10, 11
Hayes v. Florida, 470 U.S. 811 (1985)	9, 10, 11
Michigan v. Chesternut, 108 S.Ct. 1975 (1988)	10
Terry v. Ohio, 392 U.S. 1 (1969)	9
United States v. Ezell, 6 M.J. 307 (C.M.A. 1979)	11
United States v. Schneider, 14 M.J. 189 (C.M.A.1984)	10

Constitution:

U.S. CONST., amend IV	2

Statutes:

10 U.S.C. § 831	2, 6
10 U.S.C. § 890	3, 10

Statutes – Continued:

	Page
10 U.S.C. § 891	3, 10
10 U.S.C. § 892	4, 10
10 U.S.C. § 921	4, 5
10 U.S.C. § 929	4, 5
10 U.S.C. § 930	5
28 U.S.C. § 1259(3)	2

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TO THE UNITED STATES COURT OF MILITARY APPEALS

The petitioner, Herschel L. Fagan, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Military Appeals rendered in this proceeding on April 28, 1989.

OPINIONS BELOW

The opinion of the United States Court of Military Appeals is reported at 28 M.J. 64 (C.M.A. 1989). It is reprinted as Appendix A. The opinion of the United States Navy-Marine Corps Court of Military Review is reported at 24 M.J. 865 (N.M.C.M.R. 1987). It is reprinted as Appendix B.

JURISDICTION

The United States Court of Military Appeals granted the petition for review in this case on June 13, 1988. That court decided this case on April 28, 1989, affirming peti-

tioner's conviction of February 20, 1986, as affirmed by the United States Navy-Marine Corps Court of Military Review on June 19, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1259(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath, affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTES INVOLVED

§ 831. Art. 31. Compulsory self-incrimination prohibited

(a) No person subject to this chapter may compel any person to incriminate himself or to answer any question the answer to which may tend to incriminate him.

(b) No person subject to this chapter may interrogate, or request any statement from an accused or a person suspected of an offense without first informing him of the nature of the accusation and advising him that he does not have to make any statement regarding the offense of which he is accused or suspected and that any statement made by him may be used as evidence against him in a trial by court-martial.

(c) No person subject to this chapter may compel any person to make a statement or produce evidence before any military tribunal if the statement or evidence is not material to the issue and may tend to degrade him.

(d) No statement obtained from any person in violation of this article, or through the use of coercion, unlawful influence, or unlawful inducement may be received in evidence against him in a trial by court-martial.

§ 890. Art. 90. Assaulting or willfully disobeying superior commissioned officer

Any person subject to this chapter who—

(1) strikes his superior commissioned officer or draws or lifts up any weapon or offers any violence against him while he is in the execution of his office; or

(2) willfully disobeys a lawful command of his superior commissioned officer; shall be punished, if the offense is committed in time of war, by death or such other punishment as a court-martial may direct, and if the offense is committed at any other time, by such punishment, other than death, as a court-martial may direct.

§ 891. Art. 91. Insubordinate conduct toward warrant officer, noncommissioned officer, or petty officer

Any warrant officer or enlisted member who—

(1) strikes or assaults a warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office;

(2) willfully disobeys the lawful order of a warrant officer, noncommissioned officer, or petty officer; or

(3) treats with contempt or is disrespectful in language or deportment toward a warrant officer, noncommissioned officer, or petty officer while that officer is in the execution of his office; shall be punished as a court-martial may direct.

§ 892. Art. 92. Failure to obey order or regulation

Any person subject to this chapter who—

(1) violates or fails to obey any lawful general order or regulation;

(2) having knowledge of any other lawful order issued by a member of the armed forces, which it is his duty to obey, fails to obey the order; or

(3) is derelict in the performance of his duties; shall be punished as a court-martial may direct.

§ 921. Art. 121. Larceny and wrongful appropriation

(a) Any person subject to this chapter who wrongfully takes, obtains, or withholds, by any means, from the possession of the owner or of any other person any money, personal property, or article of value of any kind—

(1) with intent permanently to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, steals that property and is guilty of larceny; or

(2) with intent temporarily to deprive or defraud another person of the use and benefit of property or to appropriate it to his own use or the use of any person other than the owner, is guilty of wrongful appropriation.

(b) Any person found guilty of larceny or wrongful appropriation shall be punished as a court-martial may direct.

§ 929. Art. 129. Burglary

Any person subject to this chapter who, with intent to commit an offense punishable under section 918-928 of

this article (article 118-128), breaks and enters, in the nighttime, the dwelling house of another, is guilty of burglary and shall be punished as a court-martial may direct.

§ 930. Art. 130. Housebreaking

Any person subject to this chapter who unlawfully enters the building or structure of another with intent to commit a criminal offense therein is guilty of housebreaking and shall be punished as a court-martial may direct.

STATEMENT OF THE CASE

Petitioner was tried under the Uniform Code of Military Justice by a general court-martial in January and February, 1986, for charges of larceny, burglary, and housebreaking.[1] Contrary to his pleas, he was found guilty of two counts of larceny, one count of burglary, and one count of housebreaking. Petitioner was sentenced to five years confinement, reduction in pay grade, forfeiture of all pay and allowances, and a bad-conduct discharge from the Naval Service. The sentence was approved on review.

Between January and March, 1985, six burglaries occurred in the enlisted barracks used by 1st Battalion, 12th Marine Division, at Marine Corps Air Station, Kaneohe Bay, Hawaii during the time the battalion was away for training. Naval Investigative Service (NIS) Special Agent Shevock investigated the thefts. Special Agent Shevock asked for, and received, permission from the Commanding Officer for 1st Battalion, 12th Marines, to fingerprint approximately 100 of the battalion's Marines, including petitioner, who remained behind and did not participate in the training.

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[1] 10 U.S.C. § 921, 929, 930 (1982).

Petitioner was ordered by his commanding officer to report to NIS for fingerprinting on March 29, 1985. He was told that he would not receive his paycheck until he had done so. Petitioner reported to the NIS office at about 1:00 P.M. Special Agent Shevock attempted to fingerprint petitioner's right thumb, but he was unable to obtain a readable impression. Special Agent Shevock then noticed that petitioner's fingertips were "scraped such that the skin was swollen." He also noticed that petitioner's left ring finger pattern "bore a striking and conspicuous resemblance" to a latent print found in one of the burglarized rooms.

At approximately 2:30 P.M., Special Agent Shevock advised petitioner of his right to remain silent under Article 31[2], Uniform Code of Military Justice, and interrogated him about the burglaries. Special Agent Shevock and Special Agent Ginchereau, an assisting NIS agent, then accompanied petitioner to the emergency room at the base hospital where, according to petitioner, Special Agent Shevock requested that the doctors examine him to ensure his fitness for pretrial confinement. He also ordered that petitioner's fingers be examined by a doctor.

Special Agent Shevock next escorted petitioner to the base photo lab where his hands were photographed. Petitioner and the agents then returned to the NIS office where further interrogation occurred. At approximately 5:09 P.M., after four hours of custody, petitioner stated that he would not answer any further questions. The interrogation ceased and petitioner was released. Petitioner, at no time, felt that he was free to leave the NIS offices. In fact, he believed that he was going to be incarcerated. Record at 29.

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[2] 10 U.S.C. § 831 (1982).

Approximately six months later, on August 2, 1985, petitioner was hospitalized at Tripler Army Medical Center. At the hospital, Special Agent Shevock went to petitioner's bedside and advised him that he needed another set of fingerprints. Petitioner refused to provide them. Petitioner also refused to submit to fingerprinting when ordered to do so by Hospitalman First Class Morley, the Navy representative at the hospital. Petitioner was informed that, in any event, he would be "arrested" for failure to obey a direct order and his fingerprints would be taken. Petitioner later went to the NIS office in Kanoehe Bay on August 6, 1985 and submitted to fingerprinting. He testified that he did this to avoid the "humiliation and embarassment" of being arrested. Record at 32.

At trial, petitioner moved to suppress: 1) the fingerprints obtained on March 29 and August 6, 1985; 2) the photographs taken of petitioner's hands on March 29, 1985; and 3) the statements made to NIS on March 29 and October 1, 1985. As to all three, petitioner claimed that his Fourth Amendment rights had been violated.

The military judge initially granted the motion to suppress all of these items. He subsequently reconsidered his ruling, *sua sponte,* however and held that the fingerprints, photographs and statements were admissible. He based his decision on two factors. First, he determined that petitioner had no right to privacy in his fingerprints because all "U.S. Marines (sic) fingerprints are on file at 'Headquarters.' " Secondly, the military judge found that NIS agent Shevock had probable cause to arrest petitioner because of the similarity between petitioner's left ring fingerprint and the latent print at the crime scene.

The Navy-Marine Corps Court of Military Review upheld the decision of the trial court. Additionally, the court found that:

* * *

> (3) The appellant was advised of the commander's *order* by a member of his command and was permitted to proceed unaccompanied, at a reasonable time, to NIS for fingerprinting, albeit against his will, along with some 100 other unit members subject to same order.
>
> * * *
>
> (5) Neither the commander nor NIS, at the time, had probable cause or reasonable suspicion to conclude the appellant committed the wrongful entries and larcenies, but there were reasonable grounds to believe that one of the approximately 100 members of the unit remaining behind when the unit departed the island for training did commit the offenses, and further, that the fingerprint exemplars of such persons would identify the perpetrator by virtue of latent fingerprints taken from the crime scene.
>
> * * *
>
> (7) The intrusion upon the personal liberties and security of the appellant was minimal where the restraint of appellant's freedom was initially contemplated to be only brief in nature and solely for the purpose for obtaining the fingerprint exemplars.

Appendix B at p. 19a, 20a, *infra*. (emphasis added).

The United States Court of Military Appeals granted the petition for review on one issue: "whether petitioner's Fourth Amendment rights were violated when his commanding officer ordered him to consent to fingerprinting

without probable cause, judicial authorization, or petitioner's consent." That court ruled that since a military member's freedom is limited, petitioner was not seized for purposes of the Fourth Amendment. Appendix A, p. 12a *infra.* It also held that the manner in which the fingerprints were taken "occurred at reasonable times and in a reasonable manner." Appendix A, p. 12a *infra.* Finally, the court held that the commander's order did not amount to a seizure in violation of the Fourth Amendment. Appendix A, p. 12a *infra.*

REASONS FOR GRANTING THE WRIT

THE WRIT SHOULD BE GRANTED TO ENSURE THAT MILITARY COURTS PROPERLY APPLY THE FOURTH AMENDMENT OF THE UNITED STATES CONSTITUTION AND DECISIONS OF THIS COURT.

The decision of the Court of Military Appeals in this case contradicts the holdings of this Court. Its decision is in direct conflict with this Court's decisions in *Davis v. Mississippi,* 394 U.S. 721 (1969) and *Hayes v. Florida,* 470 U.S. 811 (1985).

The defendant in *Davis* was brought to a police station and fingerprinted in connection with a rape investigation, despite the fact that the police had neither probable cause nor judicial authorization for Davis' detention. This Court reversed the accused's rape conviction, holding that the detention violated the Fourth Amendment and exceeded the bounds of the temporary stop authorized in *Terry v. Ohio,* 392 U.S. 1 (1968).

This Court followed the *Davis* rationale in *Hayes.* In *Hayes,* the police, without probable cause or judicial authorization, went to a suspect's home and escorted him to the station house. He was told that he would be arrested if he did not cooperate. After arriving at the police station,

Hayes provided fingerprint exemplars that matched those found at the crime scene. This Court, reaffirming its holding in *Davis,* held that in the absence of consent, probable cause, or prior judicial authorization, Hayes' detention was illegal and the fingerprints obtained by the police were inadmissible fruits of that detention.

The investigatory practice used in petitioner's case are remarkably similar to the practices condemned by this Court in *Davis* and *Hayes.* Although petitioner was not escorted to the NIS offices, he was ordered by his commanding officer to report to be fingerprinted. Therefore, under military law, he had no choice but to comply with the order. *See* Uniform Code of Military Justice, Articles 90-92.[3] Additionally, petitioner had been told he would not receive his pay until he reported. Once petitioner arrived at the NIS offices, he believed that he was not free to leave and he expected to be incarcerated. *See Michigan v. Chesternut,* 108 S.Ct. 1975 (1988) (Whether a person is seized within the context of the Fourth Amendment depends on whether that person felt free to leave police custody.) Thus, the conclusion is inescapable that petitioner was seized just the same as if he had been physically escorted to be fingerprinted.

The Court of Military Appeals erroneously applied the *Davis* and *Hayes* standards. Its decision turned on the purported difference between a service member's and an ordinary citizen's constitutional rights as an ordinary citizen. Under the facts of this case, there is no such valid distinction. Denial of the petition in this case would effectively sanction the lower court's abridgement of those rights.

Although the military member's movement may be restricted, he still enjoys the rights and privileges of the Fourth Amendment. *United States v. Schneider,* 14 M.J.

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[3] 10 U.S.C. §§ 890-892 (1982).

189 (C.M.A. 1984). Here the petitioner had none. Since a service member is entitled to the protections of the Fourth Amendment, the party desiring a different rule must show a need for that rule. *United States v. Ezell,* 6 M.J. 307, 313 (C.M.A. 1979). The government has not shown a need for a rule contrary to the holdings in *Davis* and *Hayes.* The procedure used in this case may have been an expedient investigatory technique, but it was not the result of any miiltary necessity. Therefore, it is invalid.

In conclusion, petitioner was seized without probable cause, judicial authorization, or his consent, similar to the defendants in *Davis* and *Hayes.* The Court of Military Appeals decision in effect holds that this Court's rulings in *Davis* and *Hayes* do not apply to the military. Granting the petition will allow this Court to ensure that military members do not lose the significant protections guaranteed them by the Fourth Amendment.

CONCLUSION

This Honorable should grant the petition for a writ of certiorari.

APPENDIX A

UNITED STATES COURT OF MILITARY APPEALS

No. 59,679.
NMCM 86 2470.

UNITED STATES, APPELLEE

v.

HERSCHEL L. FAGAN, LANCE CORPORAL, U.S. MARINE CORPS, APPELLANT

April 28, 1989

For Appellant: *Lieutenant J.A. Toliver, JAGC, USNR* (argued).

For Appellee: *Lieutenant Scott A. Hagen, JAGC, USNR* (argued); *Captain Wendell A. Kjos, JAGC, USN* (on brief).

Opinion of the Court

COX, Judge:

The question in this case is whether appellant was "seized" in violation of the Fourth Amendment to the Constitution.[1] The facts of the case were well summarized by the Court of Military Review:

[1] The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The charges arose from wrongful entries which occurred at the enlisted barracks of 1st Battalion, 12th Marines, located at Marine Corps Air Station, Kaneohe Bay, Hawaii. Two of the entries involved room 201 of building 1655 and room 113 of building 1656 and resulted in the larceny of valuable property (a television, video cassette recorders, a telephone, and a camera, among other valuables) belonging to two of the occupants of those rooms, Corporal (CPL)S and Lance Corporal (LCPL)F, respectively. The circumstances of these two entries were similar in that they involved thefts of high value items from the victims' wall lockers, and they both occurred while the victims were away from their rooms taking part in batallion exercises at off-island training areas. During the period in which these entries occurred, the battalion had been in a heightened awareness about such matters and no one remembered seeing any strangers in or around the rooms. Concluding that the perpetrator of the offenses must have been someone from within the battalion and successfully having lifted latent fingerprints from the rooms during his investigation, the Naval Investigative Service (NIS) agent conducting the investigation, Special Agent S, sought and obtained permission from the Commanding Officer of 1st Battalion, 12th Marines, to fingerprint all Marines in the battalion who had not gone to the off-island training exercises at the time of the occurrence of the entries. Approximately 100 Marines fit this category. An officer within the battalion was assigned to assist the NIS investigative agent in obtaining fingerprints. The NIS investigator would contact the officer by telephone and request that he provide the agent with "15 or 20 members of the battalion at a given time and a given place" for fingerprinting. The officer maintained the master list of all those persons to be fingerprinted. The

NIS agent did not specify whom he wanted to see. He merely asked for a given number of persons, and the procedures were coordinated in such a way "as to cause the battalion the least amount of inconvenience." On 29 March 1985 the appellant was ordered by his unit to report to NIS for fingerprinting and was told that he would not receive his paycheck until he did. Under protest, the appellant proceeded unaccompanied to NIS. By then, the other Marines had been fingerprinted.

* * * * *

Despite the efforts of NIS, fingerprinting exemplars could not be taken from the appellant on 29 March, at least on the first attempt. NIS then visually examined his fingertip pads and found that all ten digits had been uniformly scraped. Expert testimony, during the merits, revealed the scrapes had been self-inflicted some 12 to 24 hours prior to the appellant reporting to NIS. A closer visual examination of the left ring finger further revealed distinct ridge characteristics of the fingerprint strikingly similar to those found on a latent fingerprint taken from the room of one of the victims, which characteristics were not present in the approximate 100 persons previously fingerprinted by NIS. NIS immediately advised the appellant of his Article 31, 10 U.S.C. § 831 *Miranda* rights, interrogated him, and later the same day fingerprinted and photographed his hands.

The appellant understood he was not free to leave the presence of NIS until released later in the day, and the trial judge made specific findings of fact that the appellant was subjected to custodial interrogation.

* * * * *

As the appellant's fingerprints taken on 29 March were unreadable, NIS again approached the appellant

this time at a military hospital, on 2 August 1985, where the appellant was subject to the direct authority of the hospital commander. Nevertheless, NIS kept the original commander apprised of the investigation although NIS did not request from the original commander permission to fingerprint the appellant. Upon reporting to the hospital, NIS checked in at the security desk and with Major Tribbey, the ward nurse who was in charge of the space where the appellant was assigned. He advised the ward nurse of his desire to fingerprint the appellant. Permission was granted. NIS then sought permission from the appellant, who refused. NIS requested Hospitalman First Class Morley, Navy-Marine Corps liaison officer, to order the appellant to submit to fingerprinting. Morley ordered the appellant as requested, but again the appellant refused. NIS elected not to pursue the matter further until the appellant was released from the hospital. The evidence reveals that NIS made it known to the appellant, either directly or indirectly, that he would be fingerprinted upon his release from the hospital even if it meant effecting his arrest. The appellant, upon being released from the hospital, elected to proceed to NIS, on 6 August 1985, for fingerprinting rather than chance the embarrassment of being arrested by NIS for refusing to provide fingerprints in the field. Appellant was fingerprinted on 6 August 1985 at NIS without incident, and his prints were linked to the latent prints taken from the crime scene. As a result, the appellant was interrogated on 1 October 1985 and made yet another statement.

24 MJ 865, 866, 869, 870 (1987).

We start our analysis with several observations. First, we agree with the court below that from the point on

March 29, 1985, when the NIS agents noticed that appellant had attempted to obliterate his fingerprints and that the residual ridges appeared to match prints taken from the scene of the offenses, there was probable cause to apprehend appellant and to secure his fingerprints with or without consent. Thus, our concern in this case is only with whether there was any impropriety in the process leading up to these initial observations.

Second, people ordinarily do not have enforceable expectations of privacy in their physical characteristics which are regularly on public display, such as facial appearance, voice and handwriting exemplars, and fingerprints. *Cupp v. Murphy,* 412 U.S. 291, 295, 93 S.Ct. 2000, 2003, 36 L.Ed.2d 900 (1973); *United States v. Mara,* 410 U.S. 19, 21, 93 S.Ct. 774, 775, 35 L.Ed.2d 99 (1973); *United States v. Dionisio,* 410 U.S. 1, 14, 93 S.Ct. 764, 771, 35 L.Ed.2d 67 (1973); *Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967). Therefore, again, the only question here is whether it was proper for appellant to be placed in the position that the agents were able to examine his fingerprints. The leading cases in the civilian area are *Hayes v. Florida,* 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985), and *Davis v. Mississippi,* 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969).

Davis, "a 14-year-old youth who had occassionally worked for the victim as a yardboy," was one of 24 youths who were picked up and brought to the police station for questioning and fingerprinting. The rape victim's only "description of her assailant" was "that he was a Negro youth." 394 U.S. at 722, 89 S.Ct. at 1395. Over a period of several days, petitioner "was interrogated by the police on several occasions—sometimes in his home or in a car, other times at police headquarters. . . . Several times dur-

ing this same period petitioner was exhibited to the victim in her hospital room. . . . for the purpose of sharpening the victim's description of her assailant by providing 'a gauge to go by on size and color.' " *Id.* at 722-23, 89 S.Ct. at 1395. Several days later, concededly without a warrant or probable cause for his arrest, the police drove petitioner to another city where they "confined him overnight in the" city jail. Without being afforded benefit of counsel, the youth was given "a lie detector test and signed a statement." He was then incarcerated in his home city, where he was fingerprinted. These prints, along with those of the other 23 youths, were sent to the Federal Bureau of Investigation in Washington, D.C., where they were analysed and compared with "prints taken from the window of the victim's house," through which the assailant had apparently entered. *Id.* at 723, 89 S.Ct. at 1395. The FBI's conclusion was that petitioner's prints matched those found at the scene of the crime, and the second set of prints taken from Davis were admitted in evidence.

The Supreme Court concluded that both sets of prints taken from petitioner constituted unreasonable seizures of his person in violation of the Fourth Amendment. Otherwise,

> [i]nvestigatory seizures would subject unlimited numbers of innocent persons to the harassment and ignominy incident to involuntary detention. Nothing is more clear than that the Fourth Amendment was meant to prevent wholesale intrusions upon the personal security of our citizenry, whether these intrusions be termed "arrests" or "investigatory detentions."

Id. at 726-27, 89 S.Ct. at 1397.

> Still, the Court allowed that it was arguable . . . that, because of the unique nature of the fingerprinting

> process, such detentions might, under narrowly defined circumstances, be found to comply with the Fourth Amendment even though there is no probable cause in the traditional sense.

Id. at 727, 89 S.Ct. at 1397-98 (citation omitted). This possibility was predicated on the "much less serious intrusion upon personal security than other types of police searches and detentions"; the fact that "fingerprint detention [would not] be employed repeatedly to harass any individual since the police need only one set of each person's prints"; the fact that "fingerprinting is an inherently more reliable and effective crime-solving tool than eyewitness identifications or confessions and is not subject to such abuses as the improper line-up and the 'third degree' "; and the fact that "there is no danger of destruction of fingerprints, . . . [so that] the limited detention need not come unexpectedly or at an inconvenient time." *Id.* at 727, 89 S.Ct. at 1398. These same factors, however, militate against 'exception[s]" to "the general requirement that the authorization of a judicial officer be obtained in advance of detention." *Id.* at 728, 89 S.Ct. at 1298.

In *Hayes*, law enforcement officers went to pick up petitioner at his house for the purpose of bringing him to the station for fingerprinting. There was "little specific information to tie petitioner . . . to the crime." When Hayes declined to go voluntarily, "one of the investigators explained that they would therefore arrest him." 470 U.S. at 812, 105 S.Ct. at 1645. Given the alternatives, he complied. The trial court admitted the prints, which matched prints left at the scene of the crime by the perpetrator, "analogizing to the stop-and-frisk rule of *Terry v. Ohio*, 392 U.S. 1 [88 S.Ct. 1868, 20 L.Ed.2d 899] (1968)." *Id.* at 813, 105 S.Ct. at 1645.

The Supreme Court reversed, holding that *Davis v. Mississippi, supra,* governed. In the Court's view,

> the line is crossed when the police, without probable cause or a warrant, forcibly remove a person from his home or other place in which he is entitled to be and transport him to the police station, where he is detained, although briefly, for investigative purposes. We adhere to the view that such seizures, at least where not under judicial supervision, are sufficiently like arrests to invoke the traditional rule that arrests may constitutionally be made only on probable cause.

Id. 470 U.S. at 816, 105 S.Ct. at 1647 (footnote omitted).

The Court did not, however, exclude the possibility that "a brief detention in the field for the purpose of fingerprinting" might be permissible under the Fourth Amendment, even "where there is only reasonable suspicion not amounting to probable cause." *Id.* at 816, 105 S.Ct. at 1647. Further, the Court did "not abandon the suggestion . . . that under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause and his removal to the police station for the purpose of fingerprinting." *Id.* at 817, 105 S.Ct. at 1647.[2]

In their scholarly opinion, authored by Judge Grant, the Court of Military Review surveyed the Fourth Amendment cases discussing reasonableness of searches and seizures involving fingerprints. Their findings and reasoning are cogent and bear repeating:

> In both *Hayes* and *Davis,* the Court further suggested that "under circumscribed procedures, the Fourth

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[2] For an insightful analysis of *Hayes v. Florida,* 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985), and *Davis v. Mississippi,* 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969), as they apply to these facts, *see* Schlueter, *Investigative Detentions for Purposes of Fingerprinting,* The Army Lawyer 10 (Oct. 1988).

Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause."

Before comparing the facts in the present case to the principles enunciated above, we make the following findings regarding the seizures of the appellant pursuant to the order of the commander, on 29 March 1985, to report to NIS for fingerprinting:

1. The appellant was insulated from unilateral action by NIS where NIS requested and received permission from the appellant's commander to fingerprint the appellant.

2. The commander assigned an officer in his command to act as a liaison between the command and NIS.

3. The appellant was advised of the commander's order by a member of his command and was permitted to proceed unaccompanied, at a reasonable time, to NIS for fingerprinting, albeit against his will, along with some 100 other unit members subject to the same order.

4. Appellant was not suspected of wrongdoing at the time he reported to NIS, nor was he arrested or threatened with arrest in the event he did not comply with his commander's order, or put in fear for his personal security.

5. Neither the commander nor NIS, at the time, had probable cause or reasonable suspicion to conclude the appellant committed the wrongful entries and larcenies, but there were reasonable grounds to believe that one of the approximate 100 members of the unit remaining behind when the unit departed the island for training did commit the offenses, and further, that the fingerprint exemplars of such persons would identify the perpetrator by virtue of latent fingerprints taken from the crime scene.

6. The commander had a substantial interest in identifying the perpetrator of the crimes because of the adverse impact upon morale and discipline attendant to wrongful entries and larcenies of personal property belonging to unit members deployed and unable to provide security for their personal possessions.

7. The intrusion upon the personal liberties and security of the appellant was minimal where the restraint of appellant's freedom was initially contemplated to be only brief in nature and solely for the purpose of obtaining the fingerprint exemplars.

24 MJ at 867-68 (citations omitted).

These findings led the Court of Military Review to conclude, *inter alia*, that

> [t]he appellant was not subjected to the station house dragnet operation condemned in *Hayes* and *Davis* without probable cause or warrant. He was not detained in the field by NIS contrary to the procedures prescribed in *Terry* and *[United States v.] Brignoni-Ponce*[, 422 U.S. 873, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975)] for brief detentions based upon reasonable suspicion. On the contrary, the appellant was insulated from a station house arrest or brief field detention by the presence of the commander. Most importantly, the appellant was not placed in fear in reporting to NIS, which in [*United States v.*] *Martinez-Fuerte*[, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976)] was an essential consideration in approving fixed checkpoint stops near the border without probable cause or reasonable suspicion. Granted, the commander's order, under the circumstances, was not the civilian equivalent of a grand jury *subpoena duces tecum* which in *Dionisio* was

> approved without even a reasonable nexus between the person subpoenaed and the offense committed. It was, however, more in the nature of the judicial authorization approved in *Hayes* and *Davis* for obtaining fingerprints on less than probable cause, although neither *Hayes* nor *Davis* offered any specific guidance on what such a standard might be or how it might be implemented.

24 MJ at 868.

> Further, in the Court's view,
>
> within the military context, . . . [the commander's] presence safeguarded the appellant from oppressive governmental action and his order thereby qualifies as the functional equivalent of the "circumscribed procedure" prescribed in *Hayes* and *Davis* which warrant the seizure of persons for fingerprinting on less than probable cause.

Id. While this latter possibility is intriguing, we need not resolve it to decide this case.

The question "whether a person has been 'seized' within the meaning of the Fourth Amendment" is said to turn on whether, " 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave' " police custody. *Michigan v. Chesternut*, __U.S.__, 108 S.Ct.1975, 1979, 100 L.Ed.2d 565 (1988). Of course in the military, servicemembers rarely enjoy total freedom of movement. Rather, their place of duty and comings and goings are routinely determined by superiors, with the full backing of criminal sanctions. *E.g.*, Arts. 85, 86, 87, 90, and 92, Uniform Code of Military Justice, 10 USC §§ 885, 886, 887, 890, and 892, respectively. By donning the uniform, the servicemember knowingly accepts restrictions on liberty and privacy—in the name of military necessity, effectiveness, and

discipline—that his civilian counterpart would never tolerate. *See Unger v. Zeimniak,* 27 MJ 349 (CMA 1989); *Murray v. Haldeman,* 16 MJ 74 (CMA 1983); *United States v. Middleton,* 10 MJ 123 (CMA 1981). Thus to incorporate civilian standards of freedom of movement wholesale into the military setting would be unrealistic.

In addition to this military context, the nondisruptive, nonhumiliating, and nonintrusive manner in which these prints were initially sought separates this command action from those seizures described in *Davis* and *Hayes.* Appellant was not wrenched from his home or job and was not subjected to public or even private embarrassment. The prints were sought at reasonable times and in a reasonable manner. Appellant's place of duty temporarily became the NIS office during the brief interval necessary to accomplish the procedure. As a result of this brief reassignment, the flow of his pay and entitlements was not interrupted; his employment rights were not affected; the peace and security of his personal and family life were not disturbed; and the sanctity of his abode was left inviolate.

It scarcely needs mentioning that the armed forces have an overriding obligation to maintain complete and accurate identifying data regarding their servicemembers. The need to identify combat casualties and aircraft-disaster victims for the purpose of notifying next of kin and assisting dependents is self-evident. Even if there was no preexisting fingerprint information maintained on appellant by the Marine Corps,[3] he could have been required

[3] Appellant denied that he had ever been previously fingerprinted in the military; the prosecution did not produce direct evidence of the preexistence of such prints or records; and the judge made no specific finding of their actual existence. However, the regulatory requirement that such records be maintained was established, and there was evidence that all servicemembers are routinely fingerprinted upon entry into the armed forces for the dual purpose of identification and criminal record searches.

to supply such information at any time. A servicemember simply has no basis to withhold fingerprints from military authorities, provided that the manner of collecting them is reasonable. *Cf. Murray v. Haldeman, supra.*

Under the circumstances of this case, we hold that the commander's order to appellant and his fellow Marines to proceed to the Naval Investigative Service office for the purpose of being fingerprinted was reasonable and lawful, and it did not occasion an unlawful seizure within the meaning of the Fourth Amendment.

The decision of the United States Navy-Marine Corps Court of Military Review is affirmed.

Chief Judge EVERETT concurs.

SULLIVAN, Judge (concurring in the result):

I join my Brothers in affirming appellant's convictions but do so on the basis of the inevitable discovery rule. *See United States v. Roa,* 24 MJ 297, 303-04 (CMA 1987) (Sullivan, J., concurring in the result). *See generally Segura v. United States,* 468 U.S. 796, 104 S.Ct. 3380, 82 L.Ed.2d 599 (1984); *Nix v. Williams,* 467 U.S. 431, 440-50, 104 S.Ct. 2501, 2507-12, 81 L.Ed.2d 377 (1984).

APPENDIX B

UNITED STATES NAVY-MARINE CORPS
COURT OF MILITARY REVIEW

NMCM 86 2470.

UNITED STATES

v.

HERSCHEL L. FAGAN, 272 60 2506
LANCE CORPORAL, (E-3), U.S. MARINE CORPS

Sentence Adjudged 20 Feb. 1986
Decided 19 June 1987

LCDR ROBERT J. SMITH, JAGC, USN, Appellate Defense Counsel.

LT S.A. KITTERMAN, JR., JAGC, USNR, Appellate Defense Counsel.

LT GEORJAN D. OVERMAN, JAGC, USNR, Appellate Government Counsel.

Before GORMLEY, RILEY and GRANT, JJ.

GRANT, Judge:

The appellant was tried by general court-martial (enlisted members) and, contrary to his pleas, found guilty of one specification of burglary (Charge II and the Specification), one specification of housebreaking (Charge III and the Specification), and two specifications of larceny (Charge I and the Specifications), in violation

of Article 129, 130, and 121, Uniform Code of Military Justice, 10 U.S.C. §§ 929, 930, and 921. He was sentenced to be confined for five years, to forfeit all pay and allowances, to be reduced to pay grade E-1, and to be discharged from the service with a bad-conduct discharge. The convening authority approved the sentence as adjudged. The appellant, on appeal, alleged three assignments of error, the last of which we summarily deny, as follows:

> THE PHOTOGRAPHS OF APPELLANT'S FINGERTIPS AND THE FORENSIC PATHOLOGIST'S OPINIONS ABOUT THEM SHOULD HAVE BEEN SUPPRESSED BECAUSE THEY RESULTED FROM AN ILLEGAL APPREHENSION.
>
> THE GOVERNMENT FAILED TO PROVE BEYOND A REASONABLE DOUBT THAT APPELLANT BURGLARIZED ROOM 113, BUILDING 1656 (Charge I, Specification 1 and Charge III and the Specification).
>
> APPELLANT'S GUILT AS TO SPECIFICATION 2 OF CHARGE I AND CHARGE III WAS NOT PROVEN BEYOND A REASONABLE DOUBT BECAUSE THERE WAS NO CHAIN OF CUSTODY FOR THE SOLE INCRIMINATING EVIDENCE AND THE EVIDENCE WAS NOT IDENTIFIED BY ITS OWNER.

I

A

The charges arose from wrongful entries which occurred at the enlisted barracks of 1st Battalion, 12th Marines, located at Marine Corps Air Station, Kaneohe Bay, Hawaii. Two of the entries involved room 201 of building

1655 and room 113 of building 1656 and resulted in the larceny of valuable property (a television, video cassette recorders, a telephone, and a camera, among other valuables) belonging to two of the occupants of those rooms, Corporal (CPL)S and Lance Corporal (LCPL)F, respectively. The circumstances of these two entries were similar in that they involved thefts of high value items from the victims' wall lockers, and they both occurred while the victims were away from their rooms taking part in battalion exercises at off-island training areas. During the period in which these entries occurred, the battalion had been in a heightened awareness about such matters and no one remembered seeing any strangers in or around the rooms. Concluding that the perpetrator of the offenses must have been someone from within the battalion and successfully having lifted latent fingerprints from the rooms during his investigation, the Naval Investigative Service (NIS) agent conducting the investigation, Special Agent S, sought and obtained permission from the Commanding Officer of 1st Battalion, 12th Marines, to fingerprint all Marines in the battalion who had not gone to the off-island training exercises at the time of the occurrence of the entries. Appropriately 100 Marines fit this category. An officer within the battalion was assigned to assist the NIS investigative agent in obtaining fingerprints. The NIS investigator would contact the officer by telephone and request that he provide the agent with "15 or 20 members of the battalion at a given time and a given place" for fingerprinting. The officer maintained the master list of all those persons to be fingerprinted. The NIS agent did not specify whom he wanted to see. He merely asked for a given number of persons, and the procedures were coordinated in such a way "as to cause the battalion the least amount of inconvenience." On 29 March 1985 the appellant was ordered by his unit to report to NIS for fingerprinting and

was told that he would not receive his paycheck until he did. Under protest, the appellant proceeded unaccompanied to NIS. By then, the other Marines had been fingerprinted.

At the outset, we assume without deciding that the actions of the commander in ordering the appellant to report to Naval Investigative Service (NIS) for fingerprinting constitute a seizure of his person within the protection of the Fourth Amendment, where the objective indicia surrounding the order reveal the appellant's freedom of movement was temporarily restrained, against his will, solely for the purpose of law enforcement, the show of authority did not occur "within the context of the military and its daily operations," given the NIS involvement, and there was every indication manifested to the appellant that the limited restriction on his freedom of movement at NIS was necessary for investigative purposes. *United States v. Sanford*, 12 M.J. 170 (C.M.A.1981) (distinguishable on facts). *But see United States v. Hardison*, 17 M.J. 701 (NMCMR 1983). As such, we will direct our attention to the reasonableness of the commander's order, as "what the Constitution forbids is not all searches and seizures, but unreasonable searches and seizures." *Elkins v. United States*, 364 U.S. 206, 222, 80 S.Ct. 1437, 4 L.Ed.2d 1669 (1960).

The reasonableness test requires balancing "the nature and quality of the intrusion on personal security against the importance of the governmental interests alleged to justify the intrusion." *United States v. Hensley*, 469 U.S. 221, 228, 105 S.Ct. 675, 83 L.Ed.2d 604 (1985). *See also United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 45 L.Ed.2d 607 (1975) (roving border patrol justified in briefly stopping moving vehicle near border for questioning of occupants only where there are articulable facts known to the officer making the stop, together with

rational inferences therefrom, that reasonably warrant suspicion the vehicle contained illegal aliens, citing *Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)); *United States v. Martinez-Fuerte*, 428 U.S. 543, 96 S.Ct. 3074, 49 L.Ed.2d 1116 (1976) (border patrol at fixed checkpoint may briefly detain persons in motor vehicle for questioning in regard to transportation of illegal aliens without probable cause or reasonable suspicion. The court distinguished fixed checkpoint stops from roving border patrols because the "subjective intrusion—the generating of concern or even fright on the part of lawful travelers—is appreciably less in the case of a checkpoint stop." *Martinez-Fuerte*, 428 U.S. at 558, 96 S. Ct. at 3083, 49 L.Ed.2d at 1128); *United States v. Dionisio*, 410 U.S. 1, 93 S.Ct. 764, 35 L.Ed.2d 67 (1973) (grand jury may subpoena persons to provide nontestimonial identification evidence in the nature of voice exemplars without probable cause or any reasonable grounds to connect persons subpoenaed with the crime. In holding that such seizures were reasonable and not protected by the Fourth Amendment, the Court quoted with approval excerpts from Judge Friendley's decision in *United States v. Doe*, 475 F.2d at 898 that

> [t]he latter is abrupt [referring to an arrest or investigative stop], is effected with force or the threat of it and often in demeaning circumstances, and, in the case of arrest, results in a record involving social stigma. A subpoena . . . involves no stigma . . .; if the time for appearance is inconvenient, this can generally be altered; and it remains at all times under the control and supervision of a court.

United States v. Dionisio, 410 U.S. at 10, 93 S.Ct. at 770, 35 L.Ed.2d at 77); *Davis v. Mississippi*, 394 U.S. 721, 89 S.Ct. 1394, 22 L.Ed.2d 676 (1969) (fingerprint exemplars

taken at police station pursuant to dragnet operation without probable cause or warrant is violative of Fourth Amendment); *Hayes v. Florida*, 470 U.S. 811, 105 S.Ct. 1643, 84 L.Ed.2d 705 (1985) (reaffirmed holding in *Davis*, but approved of procedure for police officer to detain briefly suspect in the field for purposes of fingerprinting "where there is only reasonable suspicion not amounting to probable cause." *Hayes v. Florida*, 470 U.S. at 816, 105 S.Ct. at 1647, 84 L.Ed.2d at 710. In both *Hayes* and *Davis*, the Court further suggested that "under circumscribed procedures, the Fourth Amendment might permit the judiciary to authorize the seizure of a person on less than probable cause." *Hayes v. Florida*, 470 U.S. at 817, 105 S.Ct. at 1647, 84 L.Ed.2d at 711; *Davis v. Mississippi*, 394 U.S. at 728, 89 S.Ct. at 1398, 22 L.Ed.2d at 681).

Because comparing the facts in the present case to the principles enunciated above, we make the following findings regarding the seizure of the appellant pursuant to the order of the commander, on 29 March 1985, to report to NIS for fingerprinting:

1. The appellant was insulated from unilateral action by NIS where NIS requested and received permission from the appellant's commander to fingerprint the appellant.

2. The commander assigned an officer in his command to act as a liaison between the command and NIS.

3. The appellant was advised of the commander's order by a member of his command and was permitted to proceed unaccompanied, at a reasonable time, to NIS for fingerprinting, albeit against his will, along with some 100 other unit members subject to the same order.

4. Appellant was not suspected of wrongdoing at the time he reported to NIS, nor was he arrested or threatened with arrest in the event he did not comply with his commander's order, or put in fear for his personal security.

5. Neither the commander nor NIS, at the time, had probable cause or reasonable suspicion to conclude the appellant committed the wrongful entries and larcenies, but there were reasonable grounds to believe that one of the approximate 100 members of the unit remaining behind when the sun departed the island for training did commit the offenses, and further, that the fingerprint exemplars of such persons would identify the perpetrator by virtue of latent fingerprints taken from the crime scene.

6. The commander had a substantial interest in identifying the perpetrator of the crimes because of the adverse impact upon morale and discipline attendant to wrongful entries and larcenies of personal property belonging to unit members deployed and unable to provide security for their personal possessions.

7. The intrusion upon the personal liberties and security of the appellant was minimal where the restraint of appellant's freedom was ~~initally~~ contemplated to be only brief in nature and solely for the purpose of obtaining the fingerprint exemplars.

A comparison of the present case and those cited above is pertinent. The appellant was not subjected to the station house dragnet operation condemned in *Hayes* and *Davis* without probable cause or warrant. He was not detained in the field by NIS contrary to the procedures prescribed in *Terry* and *Brignoni-Ponce* for brief detentions based upon reasonable suspicion. On the contrary, the appellant was insulated from a station house arrest or brief field detention by the presence of the commander. Most importantly, the appellant was not placed in fear in reporting to NIS, which in *Martinez-Fuerte* was an essential consideration in approving fixed checkpoint stops near the border without probable cause or reasonable suspicion. Granted, the commander's order, under the circumstances, was not the civilian equivalent of a grand jury *subpoena duces tecum*

which in *Dionisio* was approved without even a reasonable nexus between the person subpoenaed and the offense committed. It was, however, more in the nature of the judicial authorization approved in *Hayes* and *Davis* for obtaining fingerprints on less than probable cause, although neither *Hayes* nor *Davis* offered any specific guidance on what such a standard might be or how it might be implemented.

We recognize that a commander serves a dual purpose being responsible for the unit mission and the morale and discipline required to carry out that mission as well as acting in a quasi-judicial capacity in certain military justice matters. Although the commander in his quasi-judicial capacity did not issue a warrant for the production of fingerprint exemplars, as envisioned in *Hayes* and *Davis*, we conclude that within the military context, his presence safeguarded the appellant from oppressive governmental action and his order thereby qualifies as the functional equivalent of the "circumscribed procedure" prescribed in *Hayes* and *Davis* which warrant the seizure of persons for fingerprinting on less than probable cause. As there is no civilian counterpart for the military commander, our interpretation of the Fourth Amendment recognizes that it must be construed within the "context of military society." *United States v. Schneider,* 14 M.J. 189 (C.M.A.1982). As such, we believe the presence of the commander initially negated the requirement for probable cause or reasonable suspicion, where the appellant was treated properly at NIS and without fear or stigma; the Government has a substantial interest in identifying the perpetrator of the crimes; the intrusion into the appellant's privacy and security was minimal; the commander insulated the appellant from unilateral NIS action; and there was a reasonable nexus between the evidence sought from the approximate 100 persons fingerprinted and the identifica-

tion of the perpetrator of the crimes, although there was no probable cause or reasonable suspicion that any particular person committed the offenses. Under the circumstances, the order of the commander directing the appellant to report to NIS for fingerprinting was not an unreasonable seizure violative of the Fourth Amendment.

B

Our inquiry, however, does not end here. *Dionisio* addressed not only the Fourth Amendment implications of initially seizing the person pursuant to a *subpoena duces tecum* for purposes of obtaining voice exemplars, but the Fourth Amendment implications of actually seizing the voice exemplar. *Dionisio* decided the latter issue on the basis that there is no reasonable expectation of privacy in one's voice given its constant exposure to the public, and therefore there is no Fourth Amendment consideration in taking the actual voice exemplar given the legality of the initial seizure of the person for such purpose. *Dionisio* cited *Davis* to the effect that fingerprinting itself "involves none of the probing into an individual's private life and thoughts that marks an interrogation or search," and that in *Davis* the "initial seizure—the lawless dragnet detention . . . violated the Fourth and Fourteenth Amendments, not the taking of the fingerprints." *United States v. Dionisio*, 410 U.S. at 11, 93 S.Ct. at 770, 35 L.Ed.2d at 77 and 80.

We discern no appreciable difference between the taking of voice and fingerprint exemplars. Different mechanical procedures are required to be sure, but the underlying principles of openness to the public is evident in both. Fingerprints are routinely left behind by persons in their daily affairs without consideration of the consequences. Furthermore, the taking of fingerprints involves neither repeated harassment nor any of the privacy and security

considerations attendant to interrogations and searches. *Hayes v. Florida*, 470 U.S. at 814, 105 S.Ct. at 1646, 84 L.Ed.2d at 709. Finally, "fingerprinting is an inherently more reliable and effective crime solving mechanism than other types of evidence such as lineups and confessions." *Id.* As such, we conclude that had NIS initially taken the appellant's fingerprints during a brief stop as NIS, on 29 March, pursuant to the commander's order, the appellant would have had no reasonable expectation of privacy requiring Fourth Amendment safeguards beyond those present in the initial seizure of his person.

C

Despite the efforts of NIS, fingerprint exemplars could not be taken from the appellant on 29 March, at least on the first attempt. NIS then visually examined his fingerprint pads and found that all ten digits had been uniformly scraped. Expert testimony, during the merits, revealed the scrapes had been self-inflicted some 12 to 24 hours prior to the appellent reporting to NIS. A closer visual examination of the left ring finger further revealed distinct ridge characteristics of the fingerprint strikingly similar to those found on a latent fingerprint taken from the room of one of the victims, which characteristics were not present in the approximate 100 persons previously fingerprinted by NIS. NIS immediately advised the appellant of his Article 31, 10 U.S.C. § 831 *Miranda* rights, interrogated him, and later the same day fingerprinted and photographed his hands.

Although NIS did not conclude, on the facts known, that probable cause existed, we shall focus on the "objective factors rather than subjective intent" in our independent determination that such evidence did in fact constitute probable cause, justifying not only the subsequent

custodial interrogation of the appellant, but further warranting the subsequent fingerprinting and photographing of the appellant's hands as incidental to what in fact amounted to a custodial arrest by virtue of the appellant being in NIS custody for several hours before being released to his unit. *See Scott v. United States,* 436 U.S. 128, 138, 98 S.Ct. 1717, 56 L.Ed.2d 168 (1978). The appellant understood he was not free to leave the presence of NIS until released later in the day, and the trial judge made specific findings of fact that the appellant was subjected to custodial interrogation.

Regarding the matter of probable cause, we make one final observation. NIS lawfully could have initially taken the appellant's fingerprints upon reporting to NIS, without probable cause or reasonable suspicion, as we indicated earlier in our decision. As such, NIS also could and did lawfully observe the scraped fingertip pads and visually examine the ridge characteristics of the left ring fingertip pad without probable cause or reasonable suspicion. Such evidence, visually observed, together with the latent fingerprints taken from the crime scene that matched only the appellant's fingerprints out of the approximate 100 persons examined, constitutes the factual predicate underlying our objective determination that probable cause existed prior to the custodial interrogation of the appellant and subsequent fingerprinting and photographing of his hands while in the custody of NIS for more than a brief period of time.

D

As the appellant's fingerprints taken on 29 March were unreadable, NIS again approached the appellant this time at a military hospital, on 2 August 1985, where the appellant was subject to the direct authority of the hospital

commander. Nevertheless, NIS kept the original commander apprised of the investigation although NIS did not request from the original commander permission to fingerprint the appellant. Upon reporting to the hospital, NIS checked in at the security desk and with Major Tribbey, the ward nurse who was in charge of the space where the appellant was assigned. He advised the ward nurse of his desire to fingerprint the appellant. Permission was granted. NIS then sought permission from the appellant, who refused. NIS requested Hospitalman First Class Morley, Navy-Marine Corps liaison officer, to order the appellant to submit to fingerprinting. Morley ordered the appellant as requested, but again the appellant refused. NIS elected not to pursue the matter further until the appellant was released from the hospital. The evidence reveals that NIS made it known to the appellant, either directly or indirectly, that he would be fingerprinted upon his release from the hospital even if it meant effecting his arrest. The appellant, upon being released from the hospital, elected to proceed to NIS, on 6 August 1985, for fingerprinting rather than chance the embarrassment of being arrested by NIS for refusing to provide fingerprints in the field. Appellant was fingerprinted on 6 August 1985 at NIS without incident, and his prints were linked to the latent prints taken from the crime scene. As a result, the appellant was interrogated on 1 October 1985 and made yet another statement.

The factual scenario at the hospital differed somewhat from that on 29 March, as neither the appellant's original commander nor the hospital commander specifically authorized the fingerprinting of the appellant. However, probable cause existed on 2 and 6 August that the appellant committed the offenses, which was a safeguard not present when the appellant was initially ordered to NIS on

29 March. Further, the brief stop intended at the hospital was under the control of the ward nurse, a representative of the hospital commander. We may infer from the record that the procedure for taking the fingerprints at the hospital was intended to be brief with the least amount of intrusion on the personal liberty and security of the appellant. Under the circumstances, we find this not unlike the procedure authorized in *Hayes* for obtaining fingerprints in the field during a brief stop, without a warrant, upon reasonable suspicion, especially where the hospital staff insulated the appellant from any possible oppressive NIS conduct. The fact that appellant, under the threat of arrest, elected to proceed to NIS, on 6 August, to provide fingerprint exemplars does not take it outside the *Hayes* rationale, where the appellant's fingerprints could have been taken without incident at the hospital had the appellant so elected on 2 August. The appellant's decision to proceed to NIS was a matter of personal choice, and does not change the result envisioned by *Hayes* for the taking of fingerprint exemplars in the field upon reasonable suspicion.

Subject to the foregoing, neither *Hayes* nor our rationale would permit NIS, acting unilaterally in a dragnet operation, to remove forcibly a suspect from his home or other place to the "police station" without probable cause and authorization for fingerprinting. *See Hayes v. Florida*, 470 U.S. at 815, 105 S.Ct. at 1646, 84 L.Ed.2d at 710. We further conclude that *Hayes* would authorize the use of reasonable force during a brief field detention in the event a suspect is uncooperative for purpose of obtaining fingerprint exemplars upon reasonable suspicion. As NIS, on 2 and 6 August, had more than reasonable suspicion, it was proper to threaten the appellant with the forcible loss of freedom if he did not cooperate. The procedures in-

stituted by NIS for obtaining the appellant's fingerprints, under the circumstances, did not constitute an unreasonable seizure violative of the Fourth Amendment, and the fingerprints taken on 6 August were lawfully seized as was the appellant on 1 October 1985 for further interrogation in light of the 6 August fingerprints linking him to the latent prints taken from the crime scene.[1]

II

Appellant next claims that the Government's evidence of guilt in regard to Charge I, Specification 1, and the Specification under Charge III, allegedly consisting solely of a latent fingerprint which matched the appellant's and which was found on an inside window pane of the room broken into, was insufficient to prove his guilt beyond a reasonable doubt of the offenses as charged. Appellant maintains as well that it would have been impossible for him to commit the crimes given his location during the critical time period with Sergeant A and the short amount

---

[1] Under our disposition of the case, we need not consider appellate government counsel's alternate argument that the appellant's fingerprint exemplars were held on file at the Headquarter's level and thus the fingerprint exemplars seized by NIS, on 6 August 1985, were admissible under the inevitable discovery rule approved of in *United States v. Kozak*, 12 M.J. 389 (C.M.A. 1982) and later incorporated under Military Rule of Evidence 311(e)(1), as amended. The issue, however, would raise an interesting question regarding the effect of the inevitable discovery of substitute evidence on file, not the evidence actually seized, and would further entail an evaluation of the trial judge's findings regarding a controverted issue of fact, as the appellant hotly contested evidence that his fingerprint exemplars were on file, and the Government, at trial, failed to provide direct evidence of the existence of such fingerprint exemplars or any evidence that the Government was engaged in attempting to secure such evidence on 6 August 1985 when the appellant's fingerprint exemplars were seized by NIS.

of time that he would have had to perpetrate the crime, and that his fingerprint was in the room because he had gone there after the discovery of the crime pursuant to Sergeant A's instructions and had closed the window while guarding the room.

We find ample evidence in the record of trial to support the findings of guilty. The appellant's attempted explanations of his presence with Sergeant A at the time the crimes occurred and of how he inadvertently left a print in the room when he closed the window after Sergeant A instructed him to guard it, were both contradicted by the testimony of Sergeant A as well as by the appellant's initial statement to NIS in which he claimed no knowledge of the entry and larceny and failed to mention being in the victim's room pursuant to Sergeant A's instruction. Additionally, a forensic pathologist testified, upon studying the pictures of appellant's injured fingers, that the injuries to the fingertips were too regular to be accidental and that they occurred only a short time before the appellant was fingerprinted, thus demonstrating that the appellant purposely attempted to avoid being fingerprinted for fear of being identified as the perpetrator of the crimes. We are convinced beyond a reasonable doubt that the appellant had the opportunity and sufficient time to and did commit the offenses which are the subject of the assignment of error.

The findings of guilty and sentence as approved on review below are affirmed.

Chief Judge GORMLEY and Judge RILEY concur.

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Supreme Court, U.S.
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CLERK

No. 88-2094

In the Supreme Court of the United States

OCTOBER TERM, 1989

HERSCHEL L. FAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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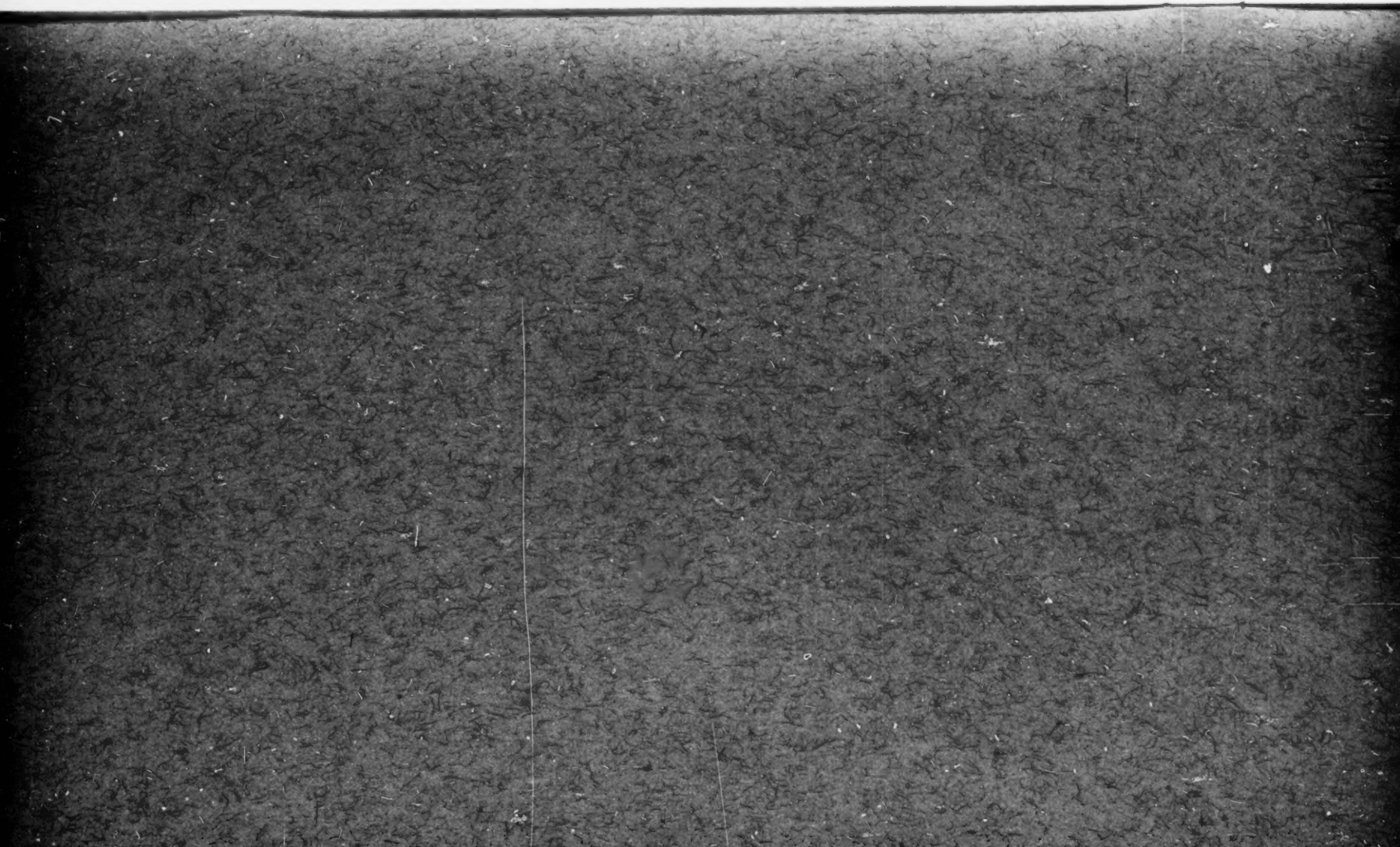

QUESTION PRESENTED

Whether the Fourth Amendment is violated when a service member is ordered by a superior to report to military law enforcement authorities for fingerprinting.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	1
Argument	4
Conclusion	8

TABLE OF AUTHORITIES

Cases:

Bell v. *Wolfish*, 441 U.S. 520 (1979)	5
Cupp v. *Murphy*, 412 U.S. 291 (1973)	5
Davis v. *Mississippi*, 394 U.S. 721 (1969)	5, 7
Hayes v. *Florida*, 470 U.S. 811 (1985)	4, 7
Parker v. *Levy*, 417 U.S. 733 (1974)	5
Schmerber v. *California*, 384 U.S. 757 (1966)	5
Skinner v. *Railway Labor Executives' Ass'n*, 109 S. Ct. 1402 (1989)	5
Terry v. *Ohio*, 392 U.S. 1 (1968)	5
United States v. *Dionisio*, 410 U.S. 1 (1973)	5
United States v. *Mara*, 410 U.S. 19 (1973)	5
United States v. *Schneider*, 14 M.J. 189 (C.M.A. 1982)	6

Constitution, statutes, and regulations:

U.S. Const. Amend. IV	7
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:	
Art. 85, 10 U.S.C. 885	6
Art. 86, 10 U.S.C. 886	6
Art. 87, 10 U.S.C. 887	6
Arts. 90-92, 10 U.S.C. 890-892	6
Art. 121, 10 U.S.C. 921	2
Art. 129, 10 U.S.C. 929	2
Art. 130, 10 U.S.C. 930	2
Marine Corps Order No. P1100.75(b) (Apr. 15, 1986)	5
U.S. Military Entrance Processing Command Reg. 350-1 (1980)	4

In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-2094

HERSCHEL L. FAGAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1a-13a) is reported at 28 M.J. 64. The opinion of the Navy-Marine Corps Court of Military Review (Pet. App. 14a-28a) is reported at 24 M.J. 865.

JURISDICTION

The Court of Military Appeals entered its judgment on April 28, 1989. The petition for a writ of certiorari was filed on June 26, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3) (Supp. V 1987).

STATEMENT

Following a general court-martial, petitioner, a member of the United States Marine Corps, was convicted on two

specifications of larceny, on one specification of burglary, and on one specification of housebreaking, in violation of Articles 121, 129, and 130 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 921, 929, and 930. Petitioner was sentenced to confinement for five years, a bad-conduct discharge, forfeiture of all pay and allowances, and a reduction in rank to pay grade E-1. The convening authority approved the findings and sentence. The Navy-Marine Corps Court of Military Review affirmed the findings and sentence. The Court of Military Appeals granted discretionary review and affirmed.

1. Early in 1985, a rash of burglaries occurred in petitioner's battalion. Tr. 21. An investigation revealed latent fingerprints in two of the rooms that had been burglarized. Tr. 8-9.[1] Despite a heightened state of awareness, no one reported seeing any outsider in the area of the burglaries. Tr. 9. This led Naval Investigative Service (NIS) Special Agent Michael Shevock to believe that the crimes were committed by a member of the battalion who had remained behind when the battalion left for training maneuvers. *Ibid.* Agent Shevock therefore decided to fingerprint the approximately 100 Marines who had remained behind. *Ibid.* After receiving permission from the battalion's commanding officer, and with the help of Lieutenant Haddock, an officer detailed for his assistance by the commanding officer, Agent Shevock began the fingerprinting process. *Ibid.* Under the procedure, Agent Shevock would ask Lieutenant Haddock for a given number of men, usually 15-20, without specifying their names. *Ibid.* Lieutenant Haddock would then select individuals in such a way as to cause the least amount of inconvenience to the battalion. Tr. 9-10.

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[1] The burglaries of those two rooms formed the basis of the charges against petitioner.

By March 29, 1985, petitioner was the only Marine who still had not been fingerprinted. Tr. 9. When informed of that fact, Gunnery Sergeant Vasquez told petitioner to report to the NIS office for fingerprinting. DX A. When petitioner appeared reluctant to comply, Sergeant Vasquez ordered petitioner to report to the NIS. *Ibid.* Petitioner then went to the NIS office. Tr. 27.

When Agent Shevock attempted to take petitioner's fingerprints, the agent discovered that the pads of petitioner's ten fingers had been severely scraped. Tr. 10. The skin was swollen and torn and would not leave a readable impression on the card. Agent Shevock did notice, however, that the print of one finger featured a conspicuous "double loop pattern" that "bore a striking and conspicuous resemblance" to a latent print he had lifted from one of the rooms. Based on that evidence, Agent Shevock suspected that petitioner had committed the crime. He read petitioner his rights and then interrogated petitioner about the burglaries. Petitioner denied any knowledge of the incidents. Petitioner also willingly agreed to have his hands photographed. *Ibid.* Petitioner was not placed under arrest at that time, and Agent Shevock assured petitioner that he was free to go whenever he liked. Tr. 15.

Four months later, on August 2, 1985, Agent Shevock went to Tripler Army Medical Center, where petitioner was a patient, in order again to attempt to fingerprint petitioner. Tr. 11, 17. Petitioner refused to be fingerprinted, however, even after Agent Shevock had a petty officer from the Navy liaison office order petitioner to allow his fingerprints to be taken. Agent Shevock then abandoned the attempt. Tr. 11. He decided to return when petitioner was released from the hospital and to arrest him, if necessary, in order to obtain his fingerprints. On August 6, Agent Shevock went back to the hospital. Tr. 11, 17.

When he arrived, however, he learned that petitioner was at the NIS office waiting to be fingerprinted. Tr. 12. The NIS matched petitioner's fingerprints to two prints taken from the scene of the crime. Petitioner later made an inculpatory statement regarding the crimes, on October 1, 1985. *Ibid.*

2. At trial, petitioner sought to suppress the fingerprints taken on March 29 and August 6, 1985, the photographs taken of his hands, and the statements he made to the NIS on March 29 and October 1, 1985. AX 1. The trial judge, relying on *Hayes* v. *Florida*, 470 U.S. 811 (1985), originally suppressed the fingerprint evidence, Tr. 43, but later reconsidered his decision and denied petitioner's motion. AX 7. The judge reasoned that petitioner had no privacy interest in his fingerprints, because they were on file with the military. *Ibid.*[2] The judge also found that there was probable cause to arrest petitioner once Agent Shevock noticed the similarity between petitioner's fingerprints and one of the latent fingerprints. *Ibid.*

ARGUMENT

Petitioner contends that the trial court erred by allowing his fingerprints to be admitted in evidence at trial. Petitioner argues that his fingerprints were obtained as a result of an unlawful seizure, because Gunnery Sergeant Vasquez ordered him to report to NIS headquarters without probable cause to believe that he had committed the burglaries.

Petitioner does not claim that he could not be fingerprinted in the absence of probable cause, and no such

[2] At trial, the government introduced evidence that under United States Military Entrance Processing Command Reg. 350-1 (1980), all applicants to the armed forces must be fingerprinted, and that the fingerprints are kept on file with the Federal Bureau of Investigation. Tr. 57-58.

claim could properly be asserted. Fingerprinting is not nearly as intrusive as actual invasions into the body, such as the extraction of blood, see *Schmerber* v. *California,* 384 U.S. 757 (1966), or body cavity searches, see *Bell* v. *Wolfish,* 441 U.S. 520 (1979). Nor is it as intrusive as having one's fingernails scraped for evidence, see *Cupp* v. *Murphy,* 412 U.S. 291 (1973), being compelled to provide a urine sample, see *Skinner* v. *Railway Labor Executives' Ass'n,* 109 S. Ct. 1402 (1989), or being stopped and frisked by a police officer on a public street, see *Terry* v. *Ohio,* 392 U.S. 1 (1968). Rather, the intrusion occasioned by being fingerprinted is minimal, *Davis* v. *Mississippi,* 394 U.S. 721, 727 (1969), and is not materially different from the compelled production of voice and handwriting samples, see *United States* v. *Dionisio,* 410 U.S. 1 (1973); *United States* v. *Mara,* 410 U.S. 19 (1973), neither of which entails significant inroads upon privacy. Indeed, military regulations require that all applicants for the armed forces must be fingerprinted before they enter the military, both to ensure that the applicant does not have a criminal record and for identification purposes. Tr. 57-58. See also Marine Corps Order No. P1100.75(b), at 2-1 para. 2-1(e) (Apr. 15, 1986). Petitioner therefore had no reason to believe that the Marine Corps could not take his fingerprints at any time.

Moreover, the military is a separate and distinct society, *Parker* v. *Levy,* 417 U.S. 733, 743 (1974), and servicemembers commonly experience restrictions on their freedom of movement that are foreign to ordinary citizens. Unlike civilian society, where citizens are generally entitled to go on their way without interference, military society necessarily limits the freedom of movement of servicemembers in the interests of discipline and readiness. Thus, while it would be constitutionally unacceptable in

the civilian community for the police to direct the daily movements of private citizens, the movements of military personnel are almost completely controlled by their superiors, and criminal sanctions may be imposed on servicemembers who fail to obey a lawful order. See Arts. 85, 86, 87, and 90-92, UCMJ, 10 U.S.C. 885, 886, 887, and 890-892. See generally Pet. App. 11a-12a. And as part of their military obligations, servicemembers may be called upon to assist in the investigation of a crime. See *United States* v. *Schneider*, 14 M.J. 189, 192 (C.M.A. 1982).[3]

Those principles dispose of this case. Petitioner could have been fingerprinted at any time, in his barracks or elsewhere. Petitioner also could have been ordered to go to another part of the base. And petitioner could have been ordered to assist the NIS in its investigation. Thus, the order to petitioner to report to the NIS office for finger-

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[3] As the Court of Military Appeals explained in *Schneider*, 14 M.J. at 192-193 (citations and footnote omitted):

> The obligations of the military member occasioned by his military status and by the relationships inherent in a military organization are different from those of the civilian to the police. There are numerous situations in the military context where a military person is required to provide information to military authorities without consideration of the existence of probable cause to detain. This may occur on the street, in offices, and in hearing rooms, as well as in places specifically provided for interrogation. And the obligation to report to such places for the purpose of giving information, if properly related to the military mission, is a valid military duty. It is the recognition of this peculiar military obligation that compelled the Congress to provide safeguards against self-incrimination, not to suspend the necessary flow of information but to protect the unwary subordinate against the subtle coercion of the military rank structure. Thus, in the military milieu, the focus has been on the protections accorded by Article 31, the Fifth Amendment equivalent, rather than on the nature of the infringement of the person's freedom of movement (Fourth Amendment).

printing imposed no additional (and certainly no unlawful) burden on him that could not have been imposed in the absence of any suspicion that he was involved in the burglaries at all. It is therefore immaterial that petitioner was ordered to report to the NIS office for fingerprinting, instead of being fingerprinted in his barracks. In either case, the sergeant's actions did not interfere with petitioner's privacy interests or his freedom of movement in a manner that is not otherwise permissible for members of the armed forces.

For that reason, petitioner errs in relying on *Davis* v. *Mississippi, supra,* and *Hayes* v. *Florida, supra.* In those cases, this Court held that, absent probable cause, a person cannot be brought to a police station for fingerprinting in a manner that amounts to a traditional arrest. By contrast, as the Court of Military Appeals explained, "the nondisruptive, nonhumiliating, and nonintrusive manner in which [petitioner's] prints were initially sought separates this command action from those seizures described in *Davis* and *Hayes.*" Pet. App. 12a. Equally important, those cases involved civilians, who are not subject to the same restraints on their freedom of movement as servicemembers. Because a servicemember may lawfully be subjected to restraints on his liberty that cannot be imposed on civilians, those cases provide no support for petitioner's Fourth Amendment claim.[4]

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[4] In any event, given the requirement that all applicants for the military must be fingerprinted, petitioner's fingerprints would have been inevitably discovered. Pet. App. 12a n.3; *id.* at 13a (Sullivan, J., concurring in the result).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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